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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

WALTER J. MATTISON,
City Attorney,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States,—

MAY IT PLEASE THE COURT:

The petition of City of Milwaukee respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioner is a municipal corporation of the State of Wisconsin and owns and operates a water works plant and furnishes, sells, distributes and supplies water to its inhabitants, various suburbs, and others. Respondent, a municipal corporation of the State of Wisconsin, is a suburb

of petitioner. Petitioner furnished and supplied the water in the litigation to respondent, which, as the owner and the operator of its distribution system, used or sold the same to its consumers.

Petitioner on October 9, 1935, commenced an action against respondent to recover the sum of $283,097.18 with interest. This was the difference between the amounts paid by respondent at the rate of six cents per hundred cubic feet for water furnished to it by petitioner from January 1, 1930 to April 4, 1935, and the amounts claimed by petitioner to be the reasonable value of the services rendered, to-wit, at the rate of ten cents per hundred cubic feet of water furnished from January 1, 1930 to June 30, 1932, and at the rate of nine cents per hundred cubic feet from July 1, 1932 to April 4, 1935. Respondent answered to the complaint. By supplemental complaint the water furnished up to and including the quarter ending June 30, 1939, was included in the action. The action was tried to the court, a jury having been waived.

A judgment was entered in favor of the petitioner on November 20, 1939, for the sum of $546,124.15, which judgment was based upon the trial court's findings of fact and conclusions of law.

The judgment was reversed by the Wisconsin Supreme Court on November 8, 1940, and is reported in 294 N. W. 625, upon the ground that petitioner had not filed a schedule of rates as to respondent for water furnished after January 1, 1930. This issue was not presented nor tried below, the case having been tried on the basis of reasonable value. The Wisconsin Supreme Court construed Sections 196.19 (1), 196.20 (2) and 196.22, Wisconsin Statutes, as applicable in this case. Petitioner's motion for rehearing upon the decision was denied by the Wisconsin Supreme Court on January 7, 1941.

The action was to recover the reasonable value over six cents per hundred cubic feet which respondent had paid for the service rendered by petitioner to respondent in supplying it with water since January 1, 1930 (R. 1-6).

In 1905 a contract was entered into between the parties whereby petitioner was to furnish respondent with water for a compensation of six cents per hundred cubic feet, and the latter, then a village, was to distribute the water to its inhabitants and charge the consumers therefor (Ex. 58, 59; R. 517, 523). In 1926 petitioner filed with the then Railroad Commission of Wisconsin a schedule of rates whereby consumers outside the city of Milwaukee were to pay ten cents per hundred cubic feet, and this schedule was approved by the Commission (Ex. 14A; R. 329). Respondent paid petitioner at the contract rate of six cents ever since the making of the contract and continued such payment to and for the quarter ending June 30, 1939 (Ex. 91; C. R. 2720).*

On October 25, 1926, the common council of the petitioner adopted a resolution by which it declared the contract to be terminated as of January 1, 1930. A copy of the resolution with a notice was served upon respondent on January 18, 1927 (Ex. E; R. 404).

On August 27, 1928, petitioner sued respondent to recover the difference between the six cents paid and the ten cent rate fixed for outside users, and respondent in 1929 sued petitioner to enjoin it from cutting off its supply of water (R. 468) and from collecting any other amount than the six cents per hundred cubic feet rate provided for in the contract. On December 28, 1929, an injunctional order was issued, among other things, enjoining petitioner from shutting off the water and from doing any act or thing which

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* "C. R." references are to the certified transcript on file in the Clerk's Office.

directly or indirectly would affect the present status existing between the parties until the hearing and final determination of the action. Petitioner kept billing respondent for water furnished at the ten cent rate and applying the six cent payments on account to July 1, 1932, when petitioner voluntarily reduced the rate to outside users to nine cents per hundred cubic feet for any purpose, and billed respondent at that rate, and this rate was approved by the Commission as to outside users (Ex. 14A; R. 329).

In the action of the petitioner to collect the difference, judgment was entered in favor of respondent. In the injunctional suit, judgment was entered in favor of respondent, and petitioner was enjoined from changing the contract rate of six cents and from shutting off the water. Both judgments were entered, after trial, on February 28, 1934. Petitioner appealed. The judgment in its case was affirmed and the judgment in the respondent's case was reversed on April 2, 1935, as reported in 217 Wis. 614, 258 N. W. 851, 259 N. W. 724. It was held that the contract was terminated as of January 1, 1930, and that the contract rate governed only to that time; that the order dated December 9, 1926, of the Railroad Commission, approving the rate schedule, did not apply to consumers who were being furnished under contract; that the petitioner in a proper action would be limited to recovery, if established, upon the basis of *quantum meruit,* over and above the amount paid; and that the petitioner could not cut off the service to respondent.

As a result of the mandate of the State Supreme Court which vacated the injunction which had enjoined petitioner from changing the six cent rate, petitioner was able to and did on April 4, 1935 (Ex. 14A; R. 329) file with the Railroad Commission the water rate to be charged respondent, nine cents per hundred cubic feet, being the rate which was charged to water consumers for water furnished outside of Milwaukee in the absence of a specific contract.

This action is to recover that excess upon the basis of reasonable value. As of June 30, 1939, that difference amounted, the trial court found (R. 42-43), to $409,648.74 and interest.

At the trial, petitioner (R. 468-469) offered and it was received (R. 469) into evidence the record in the injunctional case, in support of its contention that because of the injunction petitioner was entitled to recover the reasonable value of the service. Counsel for respondent stated that "that question has all been determined res judicata so far as this action is concerned," and that he "didn't consider that question was open because of the Supreme Court decision, so I am not going to argue that with" petitioner's trial counsel, to which the latter said "all right," and the trial upon the issue of reasonable value proceeded. Upon the last day of the trial (R. 470-471) respondent's counsel stated that in the absence of any rate established by the Public Service Commission being in effect the amount of the recovery would turn upon the reasonable value of the service.

The trial court found (R. 38) that the reasonable value of the service rendered by the petitioner to respondent, with all allowances deemed fair made in respondent's favor, was the following:

1. From January 1, 1930, to July 1, 1932..... 10 cents
2. From July 1, 1932 to December 31, 1935.... 8½ cents
3. From January 1, 1936 to the meter reading for the quarter ending June 30, 1939..... 8 cents

(per 100 cubic feet)

Petitioner's evidence showed that the reasonable value of the services rendered from January 1, 1930 to July 1, 1932, was ten cents per hundred cubic feet, and for that from July 1, 1932 to and including the meter reading for

the quarter ending June 30, 1939, was nine cents per hundred cubic feet, because:

A. Those were the rates paid by the most similar consumers in the neighborhood—West Milwaukee;

B. Milwaukee consumers paid seven cents and six cents, adding to that a differential of three cents for the cost services rendered which, in Milwaukee, are assumed by the taxpayers;

C. The cost of the services rendered exceed ten cents and nine cents; thus, considering the entire system, the average was between 10.9¢ and 12.2¢ (Ex. 29; R. 343); and considering high service, the average was between 10¢ and 11.2¢ (Ex. 90; R. 387);

D. The cost of getting water from the pumping stations to respondent in 1934 by a single 36 inch main would have been 10.4¢ and by a 30 inch main and a 24 inch main, 11.8¢ (Ex. 35; R. 358);

E. The average cost to all consumers by dividing the total allowable revenue by the amount of water sold was 9.1¢ to which a differential to outside consumers would have to be added;

F. The unit cost for respondent for another supply, deep well and softening plant, up to the distribution system would have been 12.4¢ (Ex. 75; R. 368);

G. Opinion of experts of 10¢ and 9¢.

Under the well established rule of the State Supreme Court—*Graham* v. *Zellers,* 205 Wis. 542—there was sufficient credible evidence to support the findings of the trial court.

Respondent appealed from the judgment. Upon such appeal a change was made in respondent's attorneys. For

the first time, there was presented, by way of argument in the West Allis brief, the contention that the Milwaukee utility not having filed a specific schedule of rates applicable to West Allis from January 1, 1930, was prohibited by Wisconsin Statutes (Sections 196.19, 196.20 and 196.22) from recovering for the services rendered and included in the action (West Allis Brief on Appeal, pp. 15-24) (R. 472-478). Petitioner in its brief on appeal, pp. 93-101 (R. 478-483), contended that that issue had not been presented, heard or passed upon by the trial court; that West Allis by its own acts (the injunction proceedings) had prevented Milwaukee from filing such schedule, and that confiscation would result. The result in the State Supreme Court has been above referred to.

B.

Reasons Relied On for the Allowance of the Writ.

The basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction to review the judgment of the State Supreme Court and the reasons why the writ should be allowed are as follows:

1. That said judgment and mandate violates the provisions of the 14th Amendment of the Constitution of the United States in that petitioner has been deprived of its property without due process of law, contrary to said amendment, because the judgment of the circuit court was reversed and the case decided against petitioner without a trial upon the issue of fact in the trial court.

2. That the Supreme Court of the State of Wisconsin decided the merits upon facts not contained in the record and upon a theory which had never been tried by the litigants, and the petitioner has been deprived of its day in court, without a hearing in the trial court upon the point upon

which the case was decided against petitioner by said court; all depriving petitioner of its property without due process of law contrary to the 14th Amendment of the Constitution of the United States.

3. That Sections 196.19, 196.20 and 196.22, Wisconsin Statutes as construed by the Supreme Court of the State of Wisconsin in this case, are unconstitutional because they deprive petitioner of its property without due process of law, contrary to the 14th Amendment of the Constitution of the United States.

4. That the judgment or mandate of the Supreme Court of the State of Wisconsin confiscates the property of petitioner by allowing inadequate compensation for its use, contrary to the 14th Amendment of the Constitution of the United States.

5. The judgment of the State Supreme Court in reversing the judgment of the trial court based its decision upon matters which were not presented in the pleadings nor raised in the trial court. In the trial court it was understood (R. 468-469, 470-471) that the issue in the case related to the reasonable value of the services rendered and the case was tried upon that theory. Because the issue was not presented below, the petitioner did not have an opportunity to prove that no specific schedule was filed as to respondent because of the injunctions obtained by respondent. Petitioner was deprived of its day in court and of due process of law within the meaning of the 14th Amendment of the Federal Constitution, when the State Supreme Court decided the case against petitioner upon a point which was not tried because of justifiable reliance upon the action of the respondent at the trial. The case has been decided against petitioner without its ever having had the proper opportunity to present its evidence.

WHEREFORE, it is respectfuly prayed that a writ of certiorari be isued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Wisconsin commanding that court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket No. 56, August Term, 1940, *City of Milwaukee, plaintiff-respondent* v. *City of West Allis, defendant-appellant*, and that said judgment of the Supreme Court of the State of Wisconsin may be reversed by this Honorable Court and the judgment of the trial court ordered affirmed, or that a new trial be granted in order to afford petitioner a proper opportunity to present its evidence upon the question of fact of which there was no trial in the court below and as to which there is no evidence in the record and upon which question of fact the Supreme Court of Wisconsin decided the case, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

CITY OF MILWAUKEE,
Petitioner,
By WALTER J. MATTISON,
City Attorney, Counsel for Petitioner.